

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

JACOB ALLEN WING,

Plaintiff,

vs.

LEROY KIRKEGARD, et al.,

Defendants.

CV 15-0082-H-DLC-JTJ

FINDINGS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE
JUDGE

Plaintiff Jacob Wing is proceeding in forma pauperis and without counsel. On October 21, 2016, Defendants filed a Motion for Summary Judgment. (Doc. 14.) In the motion, Defendants indicated that Mr. Wing failed to file a pretrial statement as required by the Court's April 15, 2016 Scheduling Order (Doc. 9) and did not respond to Defendants' discovery requests. (Doc. 15 at 2.) In addition, Mr. Wing did not respond to Defendants' motion for summary judgment.

On December 2, 2016, the Court issued an Order requiring Mr. Wing to show cause why this matter should not be recommended for dismissal with prejudice for failure to prosecute. (Doc. 17.) The Court advised Mr. Wing that a failure to respond would result in a recommendation that this matter be dismissed

with prejudice. *See Fed.R.Civ.P. 41(b); Malone v. U.S. Postal Service*, 833 F.2d 128 (9th Cir. 1987) (a court may dismiss an action, with prejudice, for failure to obey a court order.).

Based upon Mr. Wing's refusal to comply with the Court's April 15, 2016 Scheduling Order, refusal to participate in discovery, refusal to respond to Defendants' motion, and failure to comply with the Court's December 2, 2016 Order, this matter should be dismissed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

The Court has the inherent power to sua sponte dismiss a case for lack of prosecution or failure to comply with a court order. *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *see also* Fed.R.Civ.P. 41(b); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). Dismissal, however, is a harsh penalty and should be imposed as a sanction only in extreme circumstances. *Henderson*, 779 F.2d at 1423.

The following factors must be considered before dismissal is imposed as a sanction for failure to prosecute or failure to comply with a court order: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring

disposition of cases on their merits. *Pagtalunan v. Galaza*, 291 F.3d 639 (9th Cir. 2002) (citing *Ferdik*, 963 F.2d at 1260-61).

“The public’s interest in expeditious resolution of litigation always favors dismissal.” *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999).

This case was filed over a year ago. It is at a critical stage in that there is a pending Motion for Summary Judgment (Doc. 13) to which Mr. Wing has not filed a response. Without an ability to communicate with Mr. Wing, this matter could linger indefinitely. This factor weighs in favor of dismissal.

For much the same reasons, the second factor supports dismissal. The Ninth Circuit has noted that “[i]t is incumbent upon us to preserve the district courts’ power to manage their docket without being subject to the endless vexatious noncompliance of litigants. . . .” *Ferdik*, 963 F.2d at 1261. “The trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest.” *Pagtalunan*, 291 F.3d 639 (citing *Yourish*, 191 F.3d 983). The Court must be able to manage its docket. It cannot do so if Mr. Wing refuses to communicate with the Court. Therefore, this factor favors dismissal.

The third factor requires the Court to weigh the risk of prejudice to the Defendants. “To prove prejudice, a defendant must establish that plaintiff’s

actions impaired defendant's ability to proceed to trial or threatened to interfere with the rightful decision of the case." *Malone v. United States Postal Service*, 833 F.2d 128, 131 (9th Cir. 1987). Mr. Wing's refusal to litigate this matter makes prejudice a foregone conclusion. The longer this matter sits, the more prejudice to Defendants.

The Court has considered and provided less drastic alternatives. Alternatives may include "allowing further amended complaints, allowing additional time, or insisting that appellant associate experienced counsel." *Nevijel v. North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir. 1981). Although less drastic alternatives to dismissal should be considered, the court is not required to exhaust all such alternatives prior to dismissal. *Id.* Mr. Wing was warned about the consequences of not responding to Defendants' motion and the Court gave him an opportunity to show cause why the case should not be dismissed. He has not responded. As such, the Court can envision no further alternatives to dismissal.

The last factor weighs against dismissal because public policy favors the disposition of cases on their merits. *Pagtalunan*, 291 F.3d 639 (citing *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)). But in light of the other four factors favoring dismissal, the Court finds that this matter should be dismissed for failure to prosecute and failure to comply with the Court's order.

Based upon the foregoing, the Court issues the following:

RECOMMENDATION

1. This matter should be **DISMISSED WITH PREJUDICE** pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

2. The Clerk of Court shall close this matter, enter judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure, and terminate all pending motions.

3. The Clerk of Court shall have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith.

**NOTICE OF RIGHT TO OBJECT TO FINDINGS &
RECOMMENDATIONS AND CONSEQUENCES OF FAILURE TO OBJECT**

The parties may file objections to these Findings and Recommendations within fourteen (14) days after service (mailing) hereof.¹ 28 U.S.C. § 636. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

This order is not immediately appealable to the Ninth Circuit Court of

¹As this deadline allows a party to act after the Findings and Recommendations is “served,” it falls under Fed.R.Civ.P. 6(d). Therefore, three (3) days are added after the period would otherwise expire.

Appeals. Any notice of appeal pursuant to Fed.R.App.P. 4(a), should not be filed until entry of the District Court's final judgment.

DATED this 11th day of January 2017.

/s/ John Johnston
John Johnston
United States Magistrate Judge